UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S SECURE SOLUTIONS (USA) INC., etc.

.

and

Case 12-CA-26644

THOMAS FRAZIER, an individual

Case 12-CA-26811

CECIL MACK, an individual

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF CASE

Charges were filed by the alleged discriminatees on February 22, 2010, and July 29, 2010, respectively. In their charges, Charging Parties allege the Employer violated Section 8(a)(1) of the Act by discharging them in retaliation for engaging in protected concerted activity. Complaint issued on December 29, 2010, and a hearing was held on April 4-6, 2011.

In a decision dated June 27, 2011, Administrative Law Judge ("ALJ") William N. Cates found that Charging Parties were supervisors as defined by Section 2(11) of the Act. Given this, ALJ Cates dismissed the Complaint in its entirety, finding it unnecessary to address alleged violations of Section 8(a)(1). The Acting General Counsel filed Exceptions. In a Decision and Order dated September 28, 2012, the Board overruled the ALJ's decision, finding Charging Parties to be statutory employees and remanding the case to the ALJ for a supplemental decision regarding alleged violations of Section 8(a)(1).

On November 16, 2012, the ALJ issued a supplemental decision, finding Charging Parties' discharges violated the Act and ordering, *inter alia*, back pay, reinstatement, and a notice posting. The Employer hereby excepts to the ALJ's decision.¹

II. THE EMPLOYER'S POSITION

- **A.** The ALJ erred in finding Charging Parties were terminated because they engaged in protected concerted activity and in failing to apply controlling Board precedent.
- **B.** The ALJ erred in failing to analyze whether Charging Parties would have been discharged in the absence of participation in protected, concerted activity.²
- C. The ALJ erred in failing to find Charging Parties would have been discharged in the absence of participation in protected concerted activity.

III. STATEMENT OF FACTS

G4S Regulated Security Solutions, a division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation ("Respondent" or "Employer"), provides security services to its client, Florida Power & Light, at the Turkey Point nuclear facility in Florida City, Florida ("Turkey Point"). As part of its services, Respondent oversees thousands of acres owned by the client, as well as the numerous buildings and structures that make up the actual facilities.

Board and its agents and delegates to continue to act in the absence of a lawfully constituted quorum.

¹ In addition to the Employer's Exceptions submitted herewith and supported by this Brief, the Employer excepts to the Board's ruling at 358 NLRB No. 160 (September 28, 2012) and prospectively objects to the Board ruling on the instant Exceptions unless and until a properly appointed, constitutionally valid quorum is present. To the extent the Employer continues to participate in this proceeding, it does not waive the right to challenge the authority of the

² The Employer further excepts to the ALJ's finding, as directed by the Board on remand, that Charging Parties were not supervisors as defined in Section 2(11) of the Act. As this issue was briefed previously in Respondent's Answering Brief To Exceptions And In Support Of ALJ's Decision, and already addressed in the Board's decision issued at 358 NLRB No. 160 (September 28, 2012), the Employer does not re-brief the issue, but reserves the right to petition for review.

(Transcript from Hearing ("Tr.") at 73-74, 315-317); Administrative Law Judge Decision of June 27, 2011 ("ALJD1") at 3.

Respondent employs approximately 235 individuals at Turkey Point, with the security detail broken down into five shifts or teams, including four active duty shifts and one training shift. Each shift has approximately 36 or 37 security officers who report to seven "field supervisors" who hold the rank of lieutenant. The lieutenants report directly to the captain of their respective shifts who, in turn, report to the Operations Coordinator (Juan Rodriguez) and the Project Manager (Mike Mareth). (Tr. at 88, 216, 315-317; Organization Chart, Employer Exhibit 13; ALJD1 at 3-4.)

Charging Parties Thomas Frazier and Cecil Mack were employed as lieutenants at Turkey Point. Frazier was hired as a security officer in 1989 and promoted to lieutenant in 2003. Mack was hired as a security officer in 2002 and promoted to lieutenant in 2003. (Tr. at 153, 155, 271; ALJD1 at 5.) As discussed below, a critical role of lieutenants, including Charging Parties, is to solicit and address the concerns of security officers. In this case, the ALJ found Charging Parties were discharged because they performed this important part of their job. However, and as shown herein, this finding is unsupported by record evidence. Indeed, Charging Parties conveyed the concerns of security officers for years without negative repercussion. To the contrary, they were commended for performing this vital function.

A. An Environment Designed To Encourage Security Officers, Lieutenants And All Other Individuals Employed At Turkey Point To Bring Issues To Management's Attention

It is undisputed that Respondent has numerous processes and procedures pursuant to which security officers, lieutenants and other individuals employed at Turkey Point may, and are

encouraged to, bring virtually any type of issue to the attention of management, including every issue supposedly raised by the alleged discriminatees. (Tr. at 349-351, 391.)

As an initial matter, Respondent strives for what is called a Safety Conscious Work Environment (SCWE). As set forth in Respondent's SCWE Policy, all "employees are responsible for maintaining a questioning attitude and promptly notifying [m]anagement of all concerns and issues that relate to Nuclear Safety." (Employer Exhibit 19 at 2.)

According to a handbook provided to all employees, "a SCWE [Safety Conscious Work Environment] is an environment in which employees feel free to raise issues both to their own management and the NRC [Nuclear Regulatory Commission] without fear of retaliation and in which those issues are prioritized and promptly resolved with feedback to the employee." (Employer Exhibit 20 at 3 (page 2 of the copied handbook).) In other words, as Frazier testified, a Safety Conscious Work Environment, "is a work environment where people are not afraid to bring concerns to you for fear of retaliation or discrimination." (Employer Exhibit 3 at 3.) As the Project Manager explained, the issues covered by this concept are extremely broad and include virtually any issue of concern to an employee. (Tr. at 350-351.)

Further, under this policy, in addition to raising issues themselves, lieutenants (and captains) are obligated to relay issues raised by security officers up the chain and, if possible, attempt to resolve issues brought to their attention.³ (Tr. at 89-91, 225, 319; ALJD1 at 6-7.) As set forth in the policy, lieutenants (and captains) are "responsible to maintain open communication with the security personnel under their command and receive and address

4

_

³ Regardless of the Board's determination that lieutenants are not supervisors under Section 2(11), it is undisputed that Respondent considered lieutenants to be "supervisors" within its system and part of its management structure, and that Respondent's documents referring to "supervisors" and supervisory responsibilities are intended to apply to lieutenants, as well as captains and other members of management.

concerns and issues enthusiastically and work to promptly resolve them." (Employer Exhibit 19 at 2; Tr. at 352-353.) Because of their role in creating a Safety Conscious Work Environment, lieutenants and captains are given an additional handbook and provided supplemental training. (Tr. at 356-357; Employer Exhibit 21; ALJD1 at 6-7.) As explained in that additional handbook, among other things, lieutenants and captains must encourage the security officers under their command to raise issues, and act on those issues. (Employer Exhibit 21 at 3-16; Tr. at 356-357; ALJD1 at 6-7.)

As part of the Safety Conscious Work Environment, Respondent conducts quarterly surveys of groups of 25 employees, from security officers up to lieutenants and on up to the Project Manager. (Tr. at 353-354.) As part of those surveys, individuals provide anonymous answers to questions concerning whether they feel they "can discuss issues with my supervisors and management knowing that my input will remain confidential" and "site management supports a Safety Conscious Work Environment." (Employer Exhibit 22 at 2.) Individuals also have the opportunity to anonymously identify any issues of concern. (*Id.* at 3; Tr. at 353-354.) Based on the results of the surveys, all the nuclear facilities at which Respondent provides security services, including Turkey Point, receive a score. (Tr. at 353-354.) If the score is inadequate, the facility will have to develop a corrective action plan. (Tr. at 356.)

At a certain point in time, Project Manager Mareth and the Leadership Development Manager (Dr. Karen Bower MacDonald) determined that they needed to do more to help individuals employed at Turkey Point understand the idea of a Safety Conscious Work Environment. (Tr. at 108, 369.) As part of this effort, MacDonald created a PowerPoint that was presented to security officers, lieutenants and captains in June 2009, and Mareth (or his

Operations Manager) held Question and Answer Sessions with those individuals to solicit issues of concern. (Employer Exhibits 24, 26; Tr. at 372.)

Mareth, MacDonald and Rodriguez then put together a list of issues to address, which was called, "The First 48." (Tr. at 370.) This list is a "living document," which has been revised over time to reflect progress on various issues, but was first posted in the fourth quarter of 2009. (Tr. at 370-371; Employer Exhibits 25-26, 46.) Many of the issues supposedly raised by the alleged discriminatees appear on The First 48. (Tr. at 370-371; Employer Exhibits 25 and 46 at #29 ("Replace current vest with a more breathable one"), #34 ("Ensure 'Porta-lets' are clean"), #36 ("replace the North End port-o-let with a quality facility")).

In December 2009, Respondent provided to security officers, lieutenants and captains a document outlining certain actions it had taken over the last half of 2009 as part of these additional efforts. (Tr. at 371-372; Employer Exhibit 26.)

It is undisputed that the concept of a Safety Conscious Work Environment is extremely important to Respondent. (Tr. at 107, 351.) The concept and necessary procedures to effectuate the concept are required by Respondent's contract with Florida Power & Light and the Nuclear Regulatory Commission. (Tr. at 350-351.) Pursuant to its contract with its client, if Respondent is not doing a sufficient job of creating an environment where individuals employed at Turkey Point are comfortable raising issues of concern, then Respondent makes less money. (Tr. at 351.) Correspondingly, the Project Manager's compensation is based in part on creating such an environment and, if he fails to do so, he makes less money, as well. (Tr. at 352.)

In addition, there are other processes and procedures pursuant to which individuals employed at Turkey Point regularly raise various issues of concern. First, security officers,

lieutenants and captains can file Condition Reports (CRs) as part of the Correction Action Program (CAP), either electronically or by submitting a paper form, raising virtually any issue, including all of the issues allegedly raised by the alleged discriminatees. (Tr. at 175, 380-381.) As reflected in a report generated for January 1, 2009 through February 15, 2010, numerous security officers and lieutenants submitted condition reports on a variety of issues. (Employer Exhibit 43; Tr. at 381.)

Second, Respondent conducts Safety Meetings at which representatives of the various teams raise issues of concern and possible resolutions are discussed and tracked. (Tr. at 385.) As reflected in minutes from meetings held from June 2008 through December 2009, issues supposedly raised by the alleged discriminatees also were raised and discussed at various Safety Meetings. (Tr. at 387-390; Employer Exhibit 32, June 16, 2008 Meeting at ¶4 (cleaning of various areas), ¶ (vests); January 21, 2009 Meeting at ¶2 (water), ¶9 (hand washing stations); March 2009 at ¶9 (vests and gas masks); May 2009 at ¶5 (sanitary conditions), ¶6 (cleaning supplies), ¶10 (gas masks); June 2009 at ¶8 (cleaning supplies); August 2009 at ¶9 (vests); September 2009 at ¶7 (vests and gas masks), ¶10 (vests), ¶11 (restrooms); November 2009 at ¶4 (cleaning supplies); December 2009 at ¶1 (chairs), ¶11 (restrooms), ¶12 (vests).)

Third, security officers, lieutenants and captains can and do raise issues through Respondent's Safe to Say program and the Employee Concerns Hotline, as well as by way of informal complaints made orally or by email. (Tr. at 383.)

It is undisputed that individuals employed at Turkey Point at all levels regularly and consistently bring all sorts of issues to the attention of management. (Tr. at 250, 395.) It is also undisputed that the alleged discriminatees did so for years, as well. As Frazier explained, "I've

been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued throughout my entire tenure at Turkey Point." (Tr. at 168.) Mack also testified that he has been raising issues since he was an officer back in 2002, and that everyone "spoke out" at security briefings. (Tr. at 276.)

As mentioned above, as members of Respondent's management structure at Turkey Point, lieutenants have an important role in Respondent's efforts to create a Safety Conscious Work Environment (SCWE). In addition to numerous other responsibilities, lieutenants have a role in encouraging an environment where all employees feel they can raise issues of concern without retaliation, as reflected in various written evaluations of the alleged discriminatees. (Performance Objectives and Development Plan at 2, \$V(1), General Counsel Exhibit 8 and Employer Exhibit 11 ("Develops employees through job coaching/mentoring and performance feedback;" "Encourage/reinforce a culture that invites open/honest feedback and [a]ct positively on that feedback;" "Effectively promote use of Corrective Action Program;" and "Effectively communicate expectations and provide adequate oversight to ensure projects are completed as expected.").)

B. Leadership Effectiveness Program And Other Reasons For Termination

Commencing in the last few years, Respondent, including its lieutenants and captains, had not been performing particularly well at Turkey Point. (Tr. at 391-392.) In response to its client's concerns, Respondent created and implemented a leadership development program to improve the quality of its management at Turkey Point and the other facilities at which it provides security services to Florida Power & Light. (Tr. at 111-112, 392.) As part of this

program, MacDonald was hired in February 2009 as the first Leadership Development Manager at Turkey Point. (Tr. at 97.)

Later in 2009, Respondent's corporate headquarters developed a comprehensive program to review and analyze the leadership qualities of its lieutenants and captains at all Florida Power & Light facilities for which the Respondent provided security, including Turkey Point. (Tr. at 112-113, 392.) The "marching orders" for this new Leadership Effectiveness Program (the "Program") were presented to the Turkey Point management in late 2009, with the initial review of lieutenants and captains scheduled for early 2010 and additional reviews to be conducted annually. (Tr. at 98, 112, 122, 142; Employer Exhibit 35.)

Based on the procedures outlined in the Program and forms created by Respondent's corporate headquarters, MacDonald completed a "criteria worksheet" for each lieutenant and captain. (Employer Exhibits 35-36; Tr. at 123-126.) The scores were then entered on a master spreadsheet and converted to a summary with names in green demonstrating top performance, yellow demonstrating average performance and red corresponding to low performance. (Employer Exhibit 40; Tr. at 126.) The alleged discriminatees were two of the five individuals that fell within the red zone – the bottom 20%, with Frazier scoring the lowest of all lieutenants and captains that were reviewed. (*Id.*)

Pursuant to the Program, Mareth, MacDonald and Rodriguez then further reviewed the lowest performers, including the alleged discriminatees. (Tr. at 41, 98.) Information for these further reviews was gathered from a variety of sources, including feedback from direct reports of each lieutenant or captain, other tools designed to measure leadership effectiveness and observations of upper management, and set forth on 1-2 page summaries put together by

MacDonald. (General Counsel Exhibits 7 and 13; Employer Exhibit 14; Tr. at 41-42, 102-103, 127-128.) Based on these further reviews, Mareth recommended that Frazier and Mack and a number of other lieutenants be terminated. (Tr. at 101-102, 393.) Ultimately, based on Mareth's recommendations, Respondent's corporate headquarters terminated all five of the individuals who fell within the red zone in the initial review. (Tr. at 46-47, 128, 393; Employer Exhibit 41.)

In addition to his poor performance on the leadership review, Mack was terminated for engaging in inappropriate conduct towards the Florida Power & Light security manager, Respondent's key client contact on a daily basis at Turkey Point. (Tr. at 102, 394.) Specifically, Mack was loud and aggressive and used profanity during a discussion with the security manager. (Tr. at 394.) Such conduct is a Level I offense under Respondent's Progressive Discipline Policy and justifies termination for a first offense. (General Counsel Exhibit 17 at 10.) Once again, based on Mareth's recommendation, Respondent's corporate headquarters made the decision to terminate Mack. (Tr. at 54-55.)

IV. ARGUMENT AND AUTHORITIES

A. The ALJ Failed to Apply Controlling Board Authority in Assessing Whether Charging Parties Were Discharged As a Result of Participation in Protected Concerted Activity

In order to establish Charging Parties were unlawfully discharged for participation in protected concerted activity, the Acting General Counsel has the burden to prove that (1) Charging Parties' actions were concerted, (2) Respondent knew they were concerted, (3) Charging Parties' actions were protected by Section 7 of the Act, and (4) Charging Parties' participation in protected, concerted activity was a substantial or motivating reason for their discharge. See, e.g., Amelio's, 301 NLRB 182 (1991), citing Meyers Industries, 268 NLRB 493 (1984). Here, the ALJ did not cite to Amelio's, Meyers Industries or any other case that sets

forth the proper analyses for a protected concerted activity discharge case. Had he applied this analysis, and as set forth more fully below, he would have found that the Employer did not violate the Act.

B. The ALJ Erroneously Found Charging Parties Were Discharged Because They Engaged in Protected Concerted Activity

With almost no analysis, the ALJ found Charging Parties were discharged because they engaged in protected concerted activity. This conclusion appears to rest solely upon a single observation by the ALJ:

The evaluations reflect that the poor performance of Frazier and Mack was found to be unsatisfactory because, rather than give full allegiance to management, they did not see themselves as "part of management" but instead were "on the security officer's side."

ALJD2⁴ at 7. The observations, however, do not establish that participation in protected concerted activity was a substantial or motivating factor in Charging Parties' discharges. To the contrary, had the ALJ fully analyzed the record, he would have found that the facts belie this conclusion.

It is undisputed that Respondent has numerous programs and procedures in place – Safety Conscious Work Environment (SCWE), Corrective Action Program (CAP), Condition Reports (CRs), Safe to Say, Employee Complaint Hotline, Safety Meetings – designed to encourage security officers, lieutenants and captains to bring to management's attention virtually any issues of concern, including all of the issues supposedly raised by the alleged discriminatees. (See Section III(B), at pages 3 to 8, *supra*.) It is also undisputed that lieutenants, including the Charging Parties, have a role in this process and are supposed to relay to upper management issues raised by security officers and respond to such issues, when appropriate and within the

-

⁴ "ALJD2 at " refers to pages of the ALJ's Supplemental Decision issued on November 16, 2012.

lieutenants' power to do so. (Tr. at 89-91, 225, 319, 352-353, 356-357; Employer Exhibit 19 at 2; Employer Exhibit 21 at 3-16.) Thus, Respondent has an entire system set up, with multiple overlapping procedures, to ensure that both employees and statutory supervisors raise issues and do so free from fear of retaliation. Respondent has every interest in making sure its programs in this regard are sufficient, because of its own interest in a safe working environment, and the fact that these programs are required by Respondent's client and the Nuclear Regulatory Commission. In short, the ALJ's conclusion is belied by the fact that the Employer encourages protected concerted activity, specifically, the exact protected concerted activities in which the alleged discriminatees supposedly engaged.

Indeed, it is undisputed that security officers, lieutenants and captains bring issues to the attention of management virtually on a daily basis and have been doing so for years. (Tr. at 250 (union president has raised issues at briefings for years); Tr. at 395 (security officers and lieutenants have brought issues to the attention of management for years); Tr. at 381 (security officers and lieutenants have regularly and consistently raised issues by filing Condition Reports (CRs) as part of the Correction Action Program (CAP)); Tr. at 385, 387-390 (security officers and others regularly raised issues and concerns at Safety Meetings); Tr. at 383 (security officers and others regularly raised issues through Respondent's Safe to Say program and the Employee Concerns Hotline, as well as by way of informal complaints made orally or by email).

In fact, Frazier admits that he brought issues and concerns to the attention of management from 1989 through his termination and Mack admits that he raised similar issues from 2002 until his termination. (Tr. at 168 (Frazier has "been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued

through my entire tenure at turkey Point."); Tr. at 276 (Mack raised such issues as a security officer and lieutenant).) These facts are undisputed.

The undisputed fact that employees and Charging Parties have been raising issues for years without repercussion belies any claim that Respondent suddenly decided such conduct was unacceptable. In fact, Acting General Counsel did not introduce *any* evidence to explain why Respondent suddenly terminated the alleged discriminatees for doing something they had been doing for years, which they had been expressly instructed to do, and which other security officers, lieutenants and captains had been doing for years without retaliation. Likewise, the ALJ did not address this critical issue. This lack of evidence contradicts any finding that protected concerted activity was a substantial or motivating factor in the discharge of Charging Parties, and strongly rebuts any suggestion of retaliatory intent on the part of Respondent.

The ALJ relies on certain comments that appear in written reviews of the alleged discriminatees in support of the finding of unlawful motive. (ALJD2 at 7). A thorough analysis of those comments and the context in which they were made, however, does not support such a finding. On the contrary, the comments reflect the alleged discriminatees' failure to fulfill one of their undisputed job responsibilities – working to address and resolve employee concerns, not just bring such concerns to the attention of upper management – and otherwise fulfill their role as part of the management team. (See Employer Exhibit 19 at 2 (lieutenants (and captains) are "responsible to maintain open communication with the security personnel under their command and receive and address concerns and issues enthusiastically and work to promptly resolve them") (emphasis added); Employer Exhibit 21 at 3-16 (lieutenants and captains must encourage the security officers under their command to raise issues, and act on those issues)).

As an initial matter, and contrary to the findings of the ALJ, Charging Parties were credited, not criticized, because they "often appropriately challenge[d management] decisions." (General Counsel Exhibit 7, §1; General Counsel Exhibit 13, §1.) This makes sense because, as explained in detail above, Respondent has multiple processes and procedures in place to encourage all individuals employed at Turkey Point to raise issues and concerns. As such, in raising concerns and challenging management decisions, the alleged discriminatees were doing nothing more than what they had been encouraged, and instructed, to do, and what they have done throughout their careers as lieutenants with the Employer.

Further, unlike security officers, lieutenants must attempt to respond to and otherwise address employee concerns, if within their power to do so, as part of contributing to a Safety Conscious Work Environment (SCWE). (Employer Exhibit 19 at 2; Employer Exhibit 21 at 3-16.) As one of the captains testified, and which the ALJ failed to note, lieutenants are expected to take immediate action and handle issues where possible, in response to officer concerns:

- Q. Are there ever any occasions where you expect lieutenants under your command to try to do something to respond to complaints raised by their officers?
- A. If the I expect for my lieutenants to respond as quickly as possible to the concern, to the officer's concern. If it's immediate actions taken, I expect my lieutenants to take immediate actions and handle the situation accordingly.

(Tr. at 91.)

Charging Party Frazier corroborated the captain's above-quoted testimony and admitted lieutenants have such a responsibility, in addition to the responsibility to raise issues and concerns:

- Q. Mr. Frazier, do you admit that part of your responsibilities as a lieutenant were to try to resolve issues that were brought to your attention by security officers under your command?
- A. I believe that that is part of my nature, part of yes, part of the responsibility of a lieutenant to bring to to funnel up issues.
- Q. Now, in addition to funneling up, do you believe it was part of you responsibilities as a lieutenant that if a security officer brought an issue to your attention that was something that you believed you personally could do something about, that you had a responsibility to try to do that, to try to resolve the issue?
- A. Within the context of what the SFI [Security Force Instruction] allows me to do.

(Tr. at 225; see also Tr. at 214-215, 319, 352-353, 356-358.)

As such, it is within this context – that the alleged discriminatees were required to be part of solving and addressing issues and presenting the management side of an issue, not just raising complaints – in which the comments at issue must be considered. Respondent was not critical of the alleged discriminatees for raising issues and concerns, but for the fact that they never attempted to resolve any issue or concerns where it might have been within their power and authority to do so.

Following are the complete comments from which the ALJ pulled the statements at issue:

According to the MDQ Report (05/15/2009), Tom [Frazier] scores low in risk taking. He demonstrates unwillingness to accept, adapt, and contribute to change. Tom lacks an innovative attitude and openly criticizies [sic] management decisions at team briefings. Instead of assisiting [sic] his team members to accept change, Tom often fuels the flames with his own opinion. Often, Tom does not act on fact. Although Tom often appropriately challenges decisions, he does not provide both sides of an issue. This leaves his team with a one-sided view and causes unneeded frustration. Often, Tom identifies problems, places blame, and does little to actively solve an issue with sound analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and successful [sic] outcomes. He doesn't see himself as part of management, and therefore is not leading us into the future.

(General Counsel Ex. 7, §1.)

According to the MDQ Report (07/10/2009), Cecil [Mack] scores low in risk taking. He demonstrates unwillingness to accept, adapt, and contribute to change. Cecil lacks an innovative attitude and openly criticizies [sic] management decisions at team briefings. Instead of assisting his team members to accept change, Cecil often fuels the flames with his own opinion. Although Cecil often appropriately challenges decisions, he does not provide both sides of an issue. This leaves his team with a one-sided view and causes unneeded frustration. Often, Cecil identifies problems, places blame, and does little to actively solve an issue with sound analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and successful [sic] outcomes. He doesn't see himself as part of management, and as viewed by one direct report, "Is on the security officer's side." Cecil finds it difficult to demonstrate a balanced view.

General Counsel Ex. 13 at §1.)

When viewed in context, it becomes clear that the comments on which the ALJ relied do not support a finding of animus. Respondent was not critical of, but applauded Charging Parties' role in raising concerns and challenging management decisions. Respondent was critical, however, because Charging Parties failed in the requirement that they be part of solving issues, not because they raised or agreed with those issues.

The ALJ also erroneously concluded that, despite the various procedures in place pursuant to which all of Respondent's employees working at Turkey Point are welcome and encouraged to raise employee issues and concerns, Respondent was not sincerely concerned about the welfare of its employees. Such a conclusion is contrary to substantial evidence on the record as a whole.

As an initial matter, Project Manager Mareth testified that the issue of a Safety Conscious Work Environment (SCWE) is "very important" to Respondent. (Tr. at 351.) And, while he testified about the potential impact on profit under the contract with Florida Power & Light, he also testified that, "it's more important than just profit. It's – ultimately, you're trying to ensure

that the employees have a safe environment to work in." (Tr. at 351-351.) His testimony in this regard was not disputed in any way.

The fact that Respondent has attempted to resolve issues raised by Charging Parties further belies claims of unlawful motive. For example, one of the alleged discriminatees admitted that the Respondent "has attempted to resolve some of [the] issues that [he] raised through the years." (Tr. at 222.) Further, as explained in detail above, after Respondent solicited employee concerns and issues, it created a "living document" entitled "The First 48," which it updated to show the actions it had taken in response to specific issues. (Employer Exhibits 26 and 46.) Thus, it is clear that the Employer did not begrudge issues raised by Charging Parties and others, but instead addressed and resolved many of them.

This is further supported by General Counsel Exhibit 27, which the Acting General Counsel introduced to claim that a coaching issued to Frazier proves the Employer's animus against him for raising employee concerns. Once again, a more careful review demonstrates that this assertion has no merit.

In response to some issues raised by Fraizer, Project Manager Mareth first stated that the "feedback and recommendations are appreciated and we will evaluate each for applicability." (General Counsel Exhibit 29.) Mareth then went on to say, "I will take the opportunity to provide coaching so that in the future you can provide the feedback utilizing the more appropriate process and that is the CAP [Correction Action Program]. We reinforce the use of CAP to all levels within the department and if our supervisors do not use it effectively we will not be effective in getting quality CAP products at the officer level." (General Counsel Exhibit 27.) Thus, although Mareth used the word, "coaching" in this document, he was merely educating Fraizer on how to use a different and more appropriate procedure for relaying his

concerns. There is no evidence that this so-called "coaching" was a disciplinary action or any other form of penalty in any way. To the contrary, Mareth responded positively, noting Frazier's input was "appreciated" and, rather than retaliate, Mareth instead fixed many of the issues raised (as indicated by handwritten notes on the document).

In sum, the weight of evidence on the record evidence does not establish that protected concerted activity was a substantial or motivating factor in Charging Parties' discharges. In fact, the ALJ never even analyzed this critical component of a prima facie case. As such, his conclusions are unsupported and should be dismissed.

C. The ALJ Erred in Failing to Find Respondent Would Have Discharged the Alleged Discriminatees In the Absence of Alleged Participation in Protected Concerted Activity

Where the General Counsel establishes a *prima facie* case that in individual was terminated because he engaged in protected, concerted activity, an employer may assert a defense by demonstrating it would have taken the same action in the absence of protected activity. Wright Line, A Div. of Wright Line, 252 NLRB 1083 (1980), enf'd, 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Here, even if the ALJ properly found participation in protected concerted activity was a substantial or motivating factor in Charging Parties' discharge, the ALJ erred in failing to find Respondent has met its burden to establish the defense. In fact, and despite the Employer's arguments below, the ALJ never even analyzed the Employer's defense. Had he done so, he would have dismissed the complaint in its entirety.

As explained above, it is undisputed that in early 2009, Respondent implemented a program to improve the quality of lieutenants and captains at all of the nuclear sites where it provides security services to Florida Power & Light, including Turkey Point. As part of this program, Dr. MacDonald was hired and assigned as the first Leadership Development Manager

at Turkey Point in February 2009, with one of her primary responsibilities to develop the leadership skills of lieutenants and captains at that facility.

It is also undisputed that Respondent's corporate headquarters developed a comprehensive process to analyze the leadership qualities of all of its lieutenants and captains, including the ones at Turkey Point. Headquarters put together instructions for Turkey Point's upper management to follow and forms to use in completing the first annual review under this Leadership Effectiveness Program ("Program") in January and February 2010.

It is undisputed that, based on the first round of reviews under the Program, the alleged discriminatees were in the bottom 20% of lieutenants and captains at Turkey Point, which meant they were in the "red zone" and subject to further review, and ultimately terminated along with all other lieutenants in the bottom 20%.

It is well established that an employer may rebut a prima facie showing of discrimination by demonstrating that other employees who were not engaged in protected activity were terminated for the same reason as the alleged discriminatees. As the Board has stated:

Perez was discharged as part of a staff reduction of probationary employees prompted by business reasons. There is no evidence or contention that the general staff reduction was unlawfully motivated. Further, it is undisputed that Perez engaged in multiple incidents of misconduct and poor performance, several of which generated complaints from his coworkers. Additionally, other buffet cooks who had not engaged in union activity and whose performance, although flawed, was not as deficient as that of Perez were also discharged as part of the staff reduction. Accordingly, we find that the Respondent has met its burden of showing that it would have discharged Perez even in the absence of union activity.

. . . .

[T]he judge failed to consider that Perez' discharge occurred in the context of a general reduction in staff in which the Respondent sought to select for discharge its poorest performing employees.

Palms Hotel and Casino, 344 NLRB 1363, 1365-1366 (2005); see also Krystal Enterprises, Inc., 345 NLRB 227, 230 (2005) (decision to lay off alleged discriminate not unlawful because it was part of "a plantwide layoff of about 80 employees" and there was "no claim that this layoff was unlawfully motivated" or anything other than a "necessary response to declining sales and revenue"); Smithfield Foods, Inc., 347 NLRB 1225, 1231-1232 (2006) (evidence that respondent has terminated employees who had not engaged in protected activity for similar misconduct rebutted prima facie showing of discrimination).

In this case, in addition to the alleged discriminatees, Respondent terminated three other lieutenants (David Parris, Juan Martinez and Kimberly Millspaugh) for failing the leadership effectiveness review. (Tr. at 46-47, 128, 393; Employer Exhibit 41.) As such, individuals who were not engaged in the same, alleged protected concerted activities as the alleged discriminatees were terminated for the same reason, a fact that rebuts any prima facie finding of discrimination. Palms Hotel and Casino, 344 NLRB at 1365-1366; Krystal Enterprises, Inc., 345 NLRB at 230; Smithfield Foods, Inc., 347 NLRB at 1231. The Employer argued this below; however, the ALJ wholly failed to consider this critical piece of evidence.

The ALJ likewise failed to consider that the leadership reviews considered more than just "supervisor effectiveness." Based on the leadership reviews of Charging Parties, the ALJ found, without further analysis, that Charging Parties' were discharged "because, rather than giving full allegiance to management, they did not see themselves as 'a part of management' but instead were 'on the security officers' side." ALJD2 at 7. However, even if the alleged discriminatees

had received the highest scores possible in that category, they still would have fallen into the bottom 20% and been terminated.

Using the criteria and forms created by Respondent's corporate headquarters, MacDonald completed a "criteria worksheet" for each lieutenant and captain. (Employer Exhibits 35-36; Tr. at 123-126.) She then used those worksheets, additional documents and information, as well as feedback from the follow-up discussion on the bottom 20% amongst her, Mareth and Rodriguez to create the summaries on which the comments with which the Acting General Counsel takes issue appear. (Tr. at 41-42, 98, 102-103, 127-128.) Regardless of what came later, specifically, the comments in Category 1 (Review of supervisor effectiveness) on the summaries, the scores on the initial criteria worksheet put Frazier and Mack into the bottom 20%, which led to their termination along with three other lieutenants.

On the initial criteria worksheet, Category 1 (Review of supervisor effectiveness) was broken down into four different criteria, in 1.1 through 1.4, with each lieutenant given a score on a scale of 1 to 5, with 5 the highest possible score. Frazier was given a score of 1 on each criterion; Mack was given three 2's and one 3 on these criteria. (Employer Ex. 36, Thomas Frazier criteria worksheet, Cecil Mack criteria worksheet.) Even if Frazier and Mack were given a score of 5 on each of those criterion (1.1 through 1.4), despite any evidence they were given low scores on one or more of these criterion in response to the raising of employee issues, Frazier would have received an overall score (or Rank) of 2.75 and Mack would have received an overall score (or Rank) of 3.0. Those scores, however, still would have placed them in the bottom 20% "red zone" and resulted in termination. (Employer Ex. 40 at 1.) This demonstrates Respondent would have terminated the alleged discriminatees regardless of their

⁵ It should be noted that, of the 38 lieutenants and captains reviewed as part of this process, there were only two 5's given for the entire 152 criterion that were scored in 1.1 through 1.4. (Employer Ex. 40 at 2.)

protected, concerted activities. The ALJ never considered this critical argument which demonstrates, based on an objective standard, that the alleged discriminatees would have been terminated regardless of any protected concerted activities in which they allegedly engaged.

In addition, it is well established that an employer may rebut a prima facie showing of discrimination by demonstrating that other employees who were engaged in similar protected activities as the alleged discriminatees were not terminated. See, e.g., Sunrise Health Care Corp., 334 NLRB 903, 910 (2001). Here, it is undisputed that other security officers and lieutenants regularly raised issues similar to those raised by the alleged discriminatees. (Tr. at 164 (security officers raised issues at security briefings); Tr. at 250, 256 (union president has raised issues at briefings for years); Tr. at 381 (security officers and lieutenants have regularly and consistently raised issues by filing Condition Reports (CRs) as part of the Correction Action Program (CAP)); Tr. at 383 (security officers and others regularly raised issues through Respondent's Safe to Say program and the Employee Concerns Hotline, as well as by way of informal complaints made orally or by email); Tr. at 385, 387-390 (security officers and others regularly raised issues and concerns at Safety Meetings); Tr. at 395 (security officers and lieutenants have brought issues to the attention of management for years).

Despite the undisputed testimony that security officers and lieutenants regularly and consistently raised issues and concerns on behalf of themselves and other employees, there is no allegation that Respondent terminated or otherwise took any detrimental employment action relative to any of those other individuals for engaging in such conduct. These undisputed facts further rebut any prima facie showing of discrimination in this case. <u>Sunrise Health Care Corp.</u>, 334 NLRB at 910.

Finally, the issue of timing in this case strongly rebuts any finding of retaliation. As explained in detail above, it is undisputed that Frazier and Mack raised similar issues and concerns for twenty and seven years, respectively, prior to termination. (Tr. at 168 (Frazier has "been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued through my entire tenure at turkey Point."); Tr. at 276 (Mack raised such issues as a security officer and lieutenant).) Despite these undisputed facts, the ALJ made no finding as to why Respondent suddenly retaliated against Charging Parties for activities in which they had been engaged for years. Such undisputed facts rebut any *prima facie* showing of discrimination, as well. See, e.g., USC University Hospital, 358 NLRB No. 132 (Sept. 17, 2012).

The undisputed evidence shows that Respondent goes to great lengths to encourage all individuals employed at Turkey Point to raise virtually any and all issues of concern. It is also undisputed that the alleged discriminatees did so for many years without any retaliation by Respondent. It is inconceivable that, out of the blue, Respondent suddenly terminated them for engaging in the same type of conduct, conduct in which Respondent encouraged them to engage. As such, the ALJ erred in finding the Employer violated the Act in its decision to terminate Charging Parties.

V. <u>CONCLUSION</u>

The ALJ failed to properly analyze whether protected concerted activity was a substantial or motivating factor for Charging Parties' discharges, and likewise failed to analyze whether Charging Parties would have been discharged in the absence of participation in protected concerted activity. Had he done so, he would have dismissed the complaint in all respects.

WHEREFORE, based on the foregoing facts, arguments and authorities, Respondent respectfully requests that the Supplemental Decision of the ALJ, to the extent it finds Respondent engaged in violations of the Act, be reversed.

This 21st day of December, 2012.

Respectfully submitted,

By: /s/ Jonathan J. Spitz

Edward M. Cherof Georgia Bar No. 123390 Jonathan J. Spitz

Georgia Bar No. 672360

JACKSON LEWIS LLP

1155 Peachtree Street, N.E., Suite 1000

Atlanta, Georgia 30309-3600 Telephone: (404) 525-8200 Facsimile: (404) 525-1173 cherofe@jacksonlewis.com

spitzj@jacksonlewis.com

AND

Fred Seleman Managing Counsel – Labor Relations G4S Secure Solutions (USA) Inc. 1395 University Boulevard

Jupiter, Florida 33458

 Telephone:
 561-691-6582

 Facsimile:
 561-691-6680

 fred.seleman@usa.g4s.com

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

G4S SECURE SOLUTIONS (USA) INC., etc.

: Case 12-CA-26644

THOMAS FRAZIER, an individual : Case 12-CA-26811

CECIL MACK, an individual

and

CERTIFICATE OF SERVICE

On December 21, 2012, the foregoing Brief in Support of Respondent's Exceptions to the Supplemental Decision of the Administrative Law Judge was filed electronically and a copy served by way of electronic mail by close of business on December 21, 2012, on Shelley B. Plass, Counsel for the Acting General Counsel, at shelley.plass@nlrb.com; Thomas Frazier at tomefrazier@gmail.com, Cecil Mack at cecilmack3@gmail.com, and Chief Administrative Law Judge William N. Cates via facsimile at 404-331-2061.

By: <u>/s/ Jonathan J. S</u>pitz

Jonathan J. Spitz Georgia Bar No. 672360 spitzj@jacksonlewis.com

4834-5646-8498, v. 5